No. 3887.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

R. C. Klepper, doing business under the fictitious name of Bethlehem Motors Company,
Plaintiff in Error,

vs.

John P. Carter, Collector of Internal Revenue, Southern District of California,
Defendant in Error.

DEFENDANT'S REPLY BRIEF.

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NATURE OF THE CASE.

This is an appeal from a judgment of the District Court in favor of the defendant. The plaintiff sought to recover certain moneys alleged to have been wrongfully exacted from him as an excise tax, the tax having been collected on the ground that the plaintiff was a manufacturer or producer of automobile trucks within the meaning of title IX, section 900 of the Revenue Act of 1918, and as such had manufactured, and dur-

ing the months of July, August, September, October, November and December, 1919, had sold certain automobile trucks.

STATEMENT OF FACTS.

The facts and circumstances out of which the tax liability, if any, arose, are substantially as follows:

From the first of July, 1919, to the end of the year, plaintiff was engaged in the business of selling automobile trucks at retail. The Bethlehem Motors Corporation, of Allentown, Pa., was, during the year 1919, a manufacturer of automobile trucks and as such issued an illustrated catalogue and price list to dealers in those articles. This catalogue illustrated and listed chassis complete in all details, with accessories, engine, radiator, clutch, transmission, electric starting and lighting. This company also manufactured automobile truck bodies and issued a separate catalogue and price list thereof, giving price of bodies separate and apart from the catalogue and price list of chassis. Such bodies consisted of iron braced wood frame structures, both with and without tops. This company and many other companies and individuals manufacture and sell chassis separate and apart from the body, and body separate and apart from the chassis. Few, if any, manufacturers make all parts of, and sell, complete automobile trucks. By complete automobile trucks is meant vehicles with bodies and cabs attached to chassis and ready for the road.

The Weber Auto Body and Trailor Works, Los Angeles, Cal., during the year 1919, manufactured automobile truck bodies for the trade, but did not manufacture a chassis or any part thereof for use in automobile trucks.

During the period from July 1, 1919, to the end of that year, plaintiff purchased from the Bethlehem Motors Corporation a number of automobile truck chassis, for each of which he paid a certain specified sum, and in addition thereto reimbursed the vendor for the amount of tax previously paid by the latter upon the manufacture and sale of said chassis under the provisions of section 900, of the Revenue Act of 1918. During the same period plaintiff also purchased from the Bethlehem Motors Corporation a number of automobile truck cabs. Subsequent to their purchase he took these chassis and cabs to the Weber Auto Body and Trailer Works and caused the latter to build a body for each chassis and assemble chassis, body, and cab into a complete automobile truck, for each of which he paid to the Weber concern a certain stipulated sum, and also reimbursed the Weber concern for the amount of tax paid by it on the said bodies, under the provisions of section 900, of the Revenue Act of 1918, and thereafter during the months of July to December, inclusive, of 1919, plaintiff sold these completed trucks to its customers, each for a stipulated price for a completed truck. See photostatic copy of "Claim for Refund" wherein it was stated by plaintiff:

"The facts pertaining to each transaction on which taxes have been claimed by the collector and paid by claimant are identical, to-wit: Claimant is the local sales agency for the Bethlehem Motors Company of Allentown, Pa., and buys and pays for completed automobile truck chassis. On each one the Bethlehem Motors Co., of Allentown, Pa., as manufacturer paid the tax required by the Revenue Act of 1918. In each case where the tax has been claimed (and paid) claimant's customer has desired a body on the chassis, and claimant has taken the order for the body (as for the chassis) and has ordered the body to be built by the Weber Auto and Trailer Co., of Los Angeles, who have built, placed the body on the chassis and paid the manufacturer's tax thereon, and sold it to claimant. The claimant has then in each case sold the chassis and body to the customer."

The defendant, acting in his official capacity as Collector of Internal Revenue, demanded of the plaintiff, and the latter paid to him, a tax of three per centum of the price for which plaintiff sold the completed trucks, as aforesaid, less the amount of taxes previously paid and reimbursed by plaintiff to the Bethlehem Motors Corporation for the aforesaid chassis and the amount of tax which he had reimbursed the Weber concern. The collector claimed that said tax was due from plaintiff under and by virtue of the provisions of section 900 of the Revenue Act of 1918. Plaintiff filed claims for refund. The Commissioner of Internal Revenue rejected the same *in toto* and this suit is brought for the recovery of the amount so paid.

Assessments were made by the Commissioner of Internal Revenue against plaintiff for each of the sums collected from him as taxes. The assessments were not made, however, until some days after payment had been made by plaintiff. The taxes were paid voluntarily, without duress or protest.

THE STATUTES.

The pertinent provisions of the statute are as follows:

> "Sec. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> "(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum:
>
> "(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;"
>
> "Sec. 903. That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the commissioner, with

the approval of the secretary, may by regulations prescribe.

"The tax shall, without assessment by the commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum together with interest at rate of 1 per centum for each full month, from the time when the tax became due."

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has promulgated the following regulations for the construction and enforcement of the act:

Regulations 47 (revised December, 1920):

"Art. 6. Credit for taxes already paid.—A manufacturer may take as a credit against the tax imposed on him in respect to the sale of any article taxable under section 900 an amount equal to any tax imposed under section 900 which he has reimbursed to the manufacturer from whom he purchased any article forming a component part (whether or not changed in form by process of manufacture) of the article sold by him and in respect to which tax is paid by him, provided the tax was billed to him as a specific item and in the exact amount of the tax. Credit is not allowed unless: (1) The article forms a component part of an article sold by such manufacturer and in respect to which a tax is payable by him; (2) such manufacturer has, in fact reimbursed the manufacturer from whom purchased,

who has himself, in fact, paid the tax upon which such credit is sought; (3) unless the taxpayer keeps such records and evidence as will clearly establish his right to the same. * * *

"Art. 7. Who is a manufacturer.—A manufacturer is generally a person who (1) actually makes a taxable article, or (2) by changes in the form of an article produces a taxable article, or (3) by the combination of two or more articles produces a taxable article. Under certain circumstances, however, the person who actually makes, produces, or assembles the taxable article is not the manufacturer for the purpose of the tax. There may be several stages of manufacture and several manufacturers, each of whom must pay a tax. In such cases the tax attaches on successive sales, subject to the provisions as to credits (see Art. 6). The following examples are merely illustrative:

* * * * * * * * *

"Example 2: 'A,' an automobile body manufacturer, sells an automobile body in a knockdown condition, but complete as to all its component parts, to 'B,' a dealer, who assembles these component parts into a complete usable automobile body, and installs it, or causes it to be installed on a chassis which he has purchased from a manufacturer who is a different person from the manufacturer of the body, and sells the completed automobile. 'A' is the manufacturer of the automobile body, but may sell the same to 'B' tax free under the certificate provided for in article 14. 'B' is the manufacturer of the automobile and subject to tax on the selling price of the

completed automobile, but may take credit for the amount of tax paid by the manufacturer of the chassis. (See Arts. 3 and 6.)"

"Art. 37. Return and payment of tax.—Each manufacturer of any of the articles hereinabove enumerated must make monthly returns under oath in duplicate and pay the taxes imposed on such articles to the collector of internal revenue for the district in which his principal place of business is located. Any return may, if the amount of the tax covered thereby is not in excess of $10.00 be signed or acknowledged before two witnesses instead of under oath. The returns shall be made on Form 728 (revised). Instructions for preparing will be found on the back of the form. The returns are to be rendered and the tax paid on or before the last day of each month covering all the transactions of the preceding month, the first return to cover all transactions after February 24, 1919, and before April 1, 1919. * * *"

POINT I.

A Person Who Purchases an Automobile Truck Chassis and a Cab Separate and Apart Therefrom From the Manufacturer Thereof and Causes a Third Person, Who Is an Independent Contractor, to Build a Body and Assemble the Chassis, Body and Cab Into a Completed Automobile Truck, and Sells the Completed Truck, Has Both Manufactured and Sold an Automobile Truck Within the Meaning of Section 900 of the Revenue Act of 1918 and Is Subject to the Tax Levied Thereby.

Section 900 of the Revenue Act of 1918 provides that there shall be paid upon automobile trucks and automobile wagons (including parts, tubes, accessories, etc., sold on or in connection therewith, or with the sale thereof) sold by the manufacturer or producer, a tax equivalent to three per cent of the price for which the automobile trucks or automobile wagon is sold. It also provides that there shall be paid upon parts or accessories for automobile trucks or automobile wagons sold to any person other than a manufacturer or producer of automobile trucks or automobile wagons, by the seller of such parts or accessories, a tax equivalent to five per centum of the price for which such parts or accessories are sold. It is clear, therefore, that the person subject to tax under this act, upon automobile trucks or automobile wagons, is the person who both manufactures and sells them.

Rech-Marbaker Co. v. Lederer, Collector, 263 Fed. 593. In this case the tax was sought to be levied upon the manufacturer of an automobile body under the following circumstances:

The prospective user of an automobile truck purchased a chassis from one concern and caused the plaintiff to build a baker's wagon body and attach the same to the chassis. A tax of three per centum of the price received by plaintiff from the prospective user was collected. The plaintiff sought to recover that tax. It was levied under section 600, title VI, of the Revenue Act of 1917, the pertinent provisions of which read as follows:

> "That there shall be levied, assessed, collected and paid—
>
> "(a) Upon all automobiles, automobile trucks, automobile wagons, and motorcycles, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold; * * *."

The defendant contended that the tax was upon the manufacture, rather than upon the sale. The plaintiff argued that the tax was on both the manufacture and sale and that, as it had not sold a truck, it was not liable to the tax. In rendering judgment for the plaintiff, the court said:

> "The tax imposed is an excise tax, to be paid by those who sell the things enumerated, and is measured by 3 per cent of the price for which the thing is sold. The general thought was to cover

power trucks, along with automobiles and motorcycles. The thought was expressed as simply as possible in the act by making the tax collectible 'upon all automobiles, automobile trucks, automobile wagons, and motorcycles, sold by the manufacturer, producer, or importer.' When applied to the sale of automobiles or motorcycles, the meaning of the act is entirely clear, and the act was doubtless framed with the common mode of sale transactions of this kind in the mind of the draftsman. The thought, however, is not clear in respect to automobile trucks, because there are none which are 'sold by manufacturers, producers, or importers,' and in consequence no transactions to which the taxing clauses or measuring clauses of the law can apply. This is because automobile trucks are never dealt in or sold by any 'manufacturer, producer, or importer' as units, nor are the parts ever assembled or dealt in as units. There is no such thing as a standard type of truck with which this case concerns itself. When the prospective user wants one, he buys a chassis and sends it, together with the kind of a body he wants, to some one to have the body put on, or he sends the chassis to have a body put on it. It is then returned to him as an automobile truck, but there has been no truck sold. There has been the sale of a chassis, or the sale of a body, or separate sales of each, but no sale of a truck, unless one or the other can be said to be a truck."

"* * * We dispose of it by the ruling that the Act of 1917 imposes no tax except the one measured by a sale of an automobile truck."

The portion of the 1917 Act construed in the Rech-Marbaker case and the section of the 1918 Act here in question are substantially the same.

The Plaintiff Is a Manufacturer or Producer Within the Meaning of the Act.

It is a matter of common knowledge that no person in the United States manufactures all the parts of an automobile truck or automobile wagon, assembles them, and sells a completed automobile truck or wagon. It is also a matter of common knowledge that complete automobile truck chassis are usually, if not always, manufactured by the same concern. This being true, there are only two classes of persons whom Congress could possibly have had in mind as manufacturers of completed trucks, and upon whom it levied the tax under subdivision (1) of section 900: The one class includes those persons who purchase chassis from the manufacturers thereof and themselves manufacture bodies and the other parts and accessories necessary to a completed truck, and assemble them into a completed article; the other class includes those persons who purchase chassis from the manufacturers thereof and cause what we may call independent contractors to manufacture the body and other parts necessary to a completed truck, and assemble the various parts into a completed truck. That those persons included in the first class are manufacturers of automobile trucks within the meaning of the act, there can certainly be no dispute, for if they are not, then

we have to suppose that Congress solemnly and for the very serious purpose of raising the revenue necessary to carry on the Government, has proceeded to levy a tax upon something which it knew, or should have known, does not exist, or upon persons, for the doing of certain acts, when it knew, or should have known, that no person does those acts. If we are correct in assuming that persons in the first class are subject to the tax, then we are necessarily correct in assuming that persons in the second class are also liable therefor. The fact that plaintiff, as one of those falling in the second class, himself did no physical work on the trucks, is immaterial. He caused such work to be done, and it was done by the Weber concern, for him. *Qui facit per alium facit per se.* The terms "manufacturer" and "producer" refer to one who causes an article to be made, as well as to the one who makes it. Foss-Hughes Co. v. Lederer, Collector, decided in the United States District Court for the Eastern District of Pennsylvania, May 17, 1920, —unreported to date; Carbon Steel Co. v. Lewellyn, 251 U. S. 501; Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 511; Hancock v. State, 114 Ga. 439, 40 S. E. 317.

The Foss-Hughes case involved the same question of law and identially the same state of facts as is involved in this case. The decision was for the defendant. For the convenience of the court, as the case is as yet unreported, we copy the opinion of

Judge Dickinson (the same judge who decided the case of Rech-Marbaker v. Lederer, *supra*) in full:

"This is to all intents and purposes a case stated. The right to a jury trial was waived and the case came on to be heard without a jury. The parties then stipulated all the facts. There remains at most only an ultimate fact finding to be made under the evidentiary facts stipulated, or possibly only a question of law to be determined.

"The general situation presented is the Act of Congress of October 3rd, 1917, section 600, providing (inter alia) for the collection of a tax upon all automobile trucks sold by the manufacturer, producer, or importer thereof. There is no claim that the plaintiff imports and none that he is a manufacturer, except in the sense in which one who has something made for him by others to be sold by him may be said to be a manufacturer. This is doubtless the sense in which Congress used the word 'producer,' and was also doubtless the occasion for its use. The whole question would seem to be compressed in this one. Was the plaintiff a producer of automobile trucks?

"We are not concerned with collateral fact conditions directly but it serves to give us a grasp of the practical situation if we have in mind these other facts. One is that the tax law relates to sales of automobiles and motorcycles, as well as automobile trucks. Another is that in the administration of the law it was found that a great many sales of automobiles and motorcycles were made, but that sales of automobile trucks were

seldom made. This was because the usual course of business was for one man to make or import a chassis which he sold to the purchaser who had another man make the body which suited his purpose, or the purchaser put on the body himself. As a consequence, no one ordinarily manufactured, produced or imported an automobile truck, although there were numbers who dealt each in a part of the truck.

"Congress, in a subsequent act, corrected this oversight, but with the later act we are not now concerned. The real question before us is whether the plaintiff did not do for the purchaser what he usually had done for him by two persons and do this by producing and selling automobile trucks?

"What the purchaser wanted was a truck and to be saved the several purchases of a chassis and a body, and also of having the two made into a truck. The plaintiff supplied this need by itself purchasing the chassis from the maker and having the body added by some one engaged in that kind of work, and then selling the product as an automobile truck. The manufacturer of the chassis was a wholly independent contractor (if the phrase be an allowable one) and so likewise was the body builder. Unquestionably an automobile truck was produced. The maker of the chassis did not produce it nor did the manufacturer of the body. One of the three parties concerned was the producer (if there was one) and he must be the plaintiff. The only escape from this conclusion is that no one of them was the producer but it was a joint product of all. The taxpayer

is one who both produces and sells. This plaintiff admittedly sells, and it is through it that what it sells is brought into existence. The fact that personally it does not make chassis or body and does not even assemble is not controlling—*facit per alium facit per se.* The fact that the maker of the chassis and the maker of the body is each what the plaintiff calls an independent contractor is also aside from the mark.

"It may be stated in further explanation of the fact situation that the taxing department of the Government construed the Act of 1917 to authorize the levying of the tax on parts of a truck as well as on trucks. It may have been right or wrong in giving the act this meaning. It has been held that the manufacturer of a body only was not liable to pay a tax on the truck. Rech-Marbaker v. Lederer, March Sessions 1919. However this may be, what the department in practice did was to call the chassis an automobile truck and collect a tax on its sale; to also call the body a truck and collect a tax on its sale, and further to call the parts when assembled a truck and collect the tax on the sale of the truck. Allowance was made, however, by deduction in each instance for the tax previously paid.

"The present action is to recover the tax paid by plaintiff on the basis that it was unlawfully assessed, and this question of the legal propriety of its payment is the only question raised.

"Judgment may be entered for defendant, with costs."

In the case of Carbon Steel Company v. Lewellyn, plaintiff sued to recover a certain sum paid by him

as an alleged excise tax assessed under section 301 of title III, of the Revenue Act of 1916 (c. 463, 39 Stat. 780) known as "Munitions Manufacturers' Tax." The facts were as follows:

Plaintiff entered into three contracts with the British Government for the manufacture and delivery, f. a. s. New York, of a certain number of high explosive shells. It was not equipped, nor did it have facilities, for doing any of the described work except the manufacture of steel suitable for the shells in bar form and, therefore, to procure the manuacture of the shells, it did certain work and entered into numerous contracts in relation to various steps in making the completed shell. The major portion of the work of manufacture was done by independent contractors, each of whom agreed to and did manufacture and deliver to plaintiff certain parts of shells. The Munitions Tax Act reads as follows:

> "Sec. 301. (1) That every person manufacturing * * *. (c) projectiles, shells, or torpedoes of any kind * * *; or (f) any part of any of the articles mentioned in * * * (c) * * *; shall pay for each taxable year, in addition to the income tax imposed by title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States. * * *."

The plaintiff contended in that case, as in this, that it did not manufacture the articles enumerated in the

act, but that such articles were manufactured by certain independent contractors. In answering plaintiff's contentions, the court said:

> "* * * Petitioner, it is true, used the services of others, but they were services necessary to the discharge of its obligations and to the acquisition of the profits of such discharge. * * *"

and again:

> "* * * How universal must the manufacturing be? Will the purchase of an elemental part destroy it? And how subsidiary must the work of the subcontractor be not to relieve the contractor—take from him the character of a 'person manufacturing'? And such is the tangle of inquiries we encounter when we undertake to distinguish between what a contractor to deliver a thing does himself and what he does through others as subsidiary to his obligation.
>
> "It is after all but a question of the kind or degree of agency—the difference, to use counsel's words, between 'servants and general agents' and 'brokers, dealers, middlemen or factors.' And this distinction between the agents counsel deems important and expresses it another way as follows: 'Every person manufacturing' means the person doing the actual work individually, or through servants or general agents, and that the ownership of the material worked upon does not alter this meaning of the word.
>
> "We are unable to assent to this meaning of the word. It takes from the act a great deal of utility and makes it miss its purpose. Of

> course it did not contemplate that a 'person manufacturing' should use his own hands—it contemplated the use of other aid and instrumentalities, machinery, servants, and general agents, availing thereby of the world's division of labor, but it contemplated also the world's division of occupations, and, in this comprehensive way, contemplated that all of the world's efficiency might be availed of, and, when availed of for profits, the latter could not thereby escape being taxed. And where, indeed, was the hardship of it? The tax was on profits and measured by them."

The Munitions Tax Act under discussion are both drawn on the same general theory; the former provides that every person manufacturing shells, etc., or any part thereof, shall pay an excise tax of twelve and one-half per centum of the entire net profits received or accrued for the taxable year from the sale or disposition of such articles; the latter provides that there shall be paid on automobile trucks, etc., sold by the manufacturer or producer a tax equivalent to three per centum of the price for which so sold. The tax in each case is an excise on the manufacture measured by the sale price. The only difference is in the measure of the tax. One is measured by gross sales and the other by net profits arising from sale. The striking thing about the opinion in the Carbon Steel case is the broad, common sense view which the court takes in reaching the manifest intention of Congress and the summary way in which the court dis-

cards the refined distinctions and highly technical reasoning of the plaintiff.

The same conclusion was reached by the court in the case of Forged Steel Wheel Co. v. Lewellyn, *supra*, —another munitions tax case involving the same statute. There the question involved was whether the plaintiff was the manufacturer of a part of a shell within the meaning of the act. The plaintiff contended that it was not subject to the tax, for two reasons: First, that the article it turned out was not a part within the meaning of the act; and, second that it was not the manufacturer of a whole part, inasmuch as it either had made by an independent contractor, or bought in the market, the grade of steel required. The court confined itself largely to the consideration of the first contention and gave the second scant consideration. The case was decided against the taxpayer. In the Forged Steel Wheel Company case, as in the present case, the plaintiff contended that the case was ruled by Tide Water Oil Co. v. U. S., 171 U. S. 210. In distinguishing the cases, the court, in the Forged Steel case, said:

> "For the sake of brevity we consider only the cited decisions of this court. They are Tide Water Oil Co. v. United States, 171 U. S. 210, 218; Worthington v. Robbins, 139 U. S. 337; Anheuser-Busch Association v. United States, 207 U. S. 556. These were customs cases and the statutes were given an interpretation on account of their purpose. They are besides not in point.

In the first one the statute had the words 'wholly manufactured,' and, giving effect to them it was decided that boxes made from shooks imported from Canada, though nailed together and the sides of the boxes thus formed trimmed in the United States, were not boxes, 'wholly manufactured' in the United States and entitled, upon being exported, to a drawback under a statute which allowed a drawback on articles 'wholly manufactured of materials imported.' The Worthington case was cited. In that case a duty was exacted upon 'white hard enamel' under a statute which imposed a duty of 25% upon 'watches, watch cases, watch movements, parts of watches and watch materials.' This on the contention of the Government that the enamel fell under the head of 'watch materials.' The contention was rejected, it being conceded that the enamel was used for many other purposes than for watch faces. In the Anheuser-Busch case a claim of drawback upon corks exported with bottled beer was rejected. The ground of the claim was that the corks were subjected to a special treatment to be fit for use and hence it was contended that they should be regarded as 'imported materials * * * used in the manufacture of articles manufactured or produced in the United States' that is the bottled beer. We replied 'a cork put through the claimant's process is still a cork.' The cases, therefore, do not sustain the contention for which they are cited."

Plaintiff relies upon the case of Cate v. Connell, 173 Fed. 445; Hall and Kaul v. Friday, 158 Fed. 593,

and Lake v. Guillot, 19 Southern 924. None of these cases are decisive of the point at issue and even though they were, they must give way to the decision of the Supreme Court in the Carbon Steel case cited above. In Cate v. Connell, the court stated the question to be:

> "* * * To support their contention the petitioners do not rely upon any word in section 4 except 'manufacturing,' and so the decision of the case is made to turn upon the answer to this question: Was the repairing of automobiles, as performed by the respondent, a manufacturing pursuit?"

and in deciding the point said:

> "* * * We do not think that the repairing of automobiles, as set out in the finding of the court below and in the evidence contained in the record, can fairly be described as a manufacturing pursuit. It seems to have been chiefly, if not altogether, the adjustment of automobile parts, bought from other persons, to existing automobiles. While no decided case is exactly in point, both the definitions of manufacture given by courts of authority and the decisions which those courts have rendered on particular facts are here persuasive against the petitioner. * * *"

The case is so clearly distinguishable from the present case on both facts and the law as to need no further discussion.

In the case of Hall and Kaul v. Friday, the question involved was whether a corporation, the principal business of which was the building and construction

of concrete arches, bridges, walls, and other structure *in situ,* the concrete being mixed as used in the structure, which when completed became part of the realty, was engaged principally in manufacturing within the meaning of the Federal Bankruptcy Act of 1898. The court held that it was not engaged in manufacturing because what it built or made was attached to and became a part of the realty as fast as it was made—that the bankrupt was a builder or constructor, rather than a manufacturer.

There are other considerations which point irresistibly to the conclusion that Congress intended that the transaction involved in the present case should be subject to the tax. Subdivision (3) of section 900, levies a tax on automobile parts and provides that when such parts are sold to a manufacturer they shall be exempt from the tax. Chassis and bodies are unquestionable "parts" of automobile trucks or wagons; hence there is no escaping the conclusion that when Congress levied a tax on the manufacture and sale of the completed article, it contemplated that such parts would be sold to a person who would be a manufacturer within the meaning of the act, and that when such person took these parts and did further work upon them, or manufactured or caused to be manufactured other parts and assembled or caused to be assembled the parts purchased and those manufactured by himself or by others for him into a completed truck, that person should be subject to the tax.

The plaintiff does not seem to deny that he sold a completed automobile truck. Consequently, it is sufficient to point out that what plaintiff sold and delivered to his customer was a completed truck and the consideration he received therefor was the price of the completed truck.

POINT II.

Taxes Paid Voluntarily and Without Duress and Protest, Cannot Be Recovered.

1. There is nothing in the stipulation of facts, nor in the exhibits, to indicate that the taxes were paid under protest, and as the burden of proof is upon the plaintiff, it must be assumed that the taxes were paid voluntarily.

It has been settled law since the decision of the Supreme Court in the case of Chesebrough v. U. S., 192 U. S. 253, that taxes paid voluntarily and without protest cannot be recovered back by suit and that payments with knowledge and without compulsion are voluntary. In that case the petitioner had entered into an agreement with the Chesebrough Building Company to convey to that corporation certain real estate which he then owned, and to deliver and execute a deed therefor on June 5, 1900. On that day he tendered such deed to the purchaser. The purchaser refused to accept the deed until the petitioner had affixed certain stamps thereto as provided by sec-

tion 6 of the Act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes." The petitioner thereupon purchased from the Collector of Internal Revenue the necessary stamps and affixed them to the deed. He then brought suit to recover the amount paid for such stamps, on the ground that the act was unconstitutional and void, his claim for the refund thereof having been duly filed with the Commissioner of Internal Revenue prior thereto. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the Supreme Court. On page 259, Mr. Chief Justice Fuller, speaking for the court said:

> "The rule is firmly established that taxes voluntarily paid cannot be recovered back and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the

party making the payment, from which the latter has no other means of immediate relief than such payment." (The court here reviewed the previous decisions on this point.)

The Chesebrough case was followed in the case of U. S. v. New York and Cuba Mail Steamship Co., 200 U. S. 488. There the defendant had affixed stamps required by the War Revenue Act of 1898 to the manifest of a vessel in order to obtain clearance under section 4179, R. S., without presenting any claim or notice to the Collector of Internal Revenue from whom the stamps were purchased, or to the collector of the port from whom the clearance was obtained that the same were purchased or affixed under protest or otherwise than voluntarily. Subsequently, an action was brought to recover the amount paid for the stamps on the ground that the tax was unconstitutional as a tax on exports. The act in question had in fact been held unconstitutional in the case of Fairbanks v. U. S., 181 U. S. 283. The Supreme Court, however, sustained a demurrer to the complaint, on the ground that the taxes sought to be recovered had not been paid under protest or duress and, consequently, could not be recovered. In answer to the contention that duress or coercion in the payment of taxes is not a necessary basis of the right of recovery thereof, under the Act of Congress of May 12, 1900, entitled "An act authorizing the Commissioner of Internal Revenue to redeem or make

allowance for Internal Revenue stamps," the court said, page 495:

> "It certainly does not follow that because, in some instances, protest or duress cannot exist, that they cannot exist in other cases, nor that the act intended to destroy the difference between voluntary and involuntary payment of taxes."

Again, the court says. at page 493:

> "The applicable principle is expressed in the extract from the Chesebrough case which we have given above. It is stated in R. R. Co. v. Commissioners, 98 U. S. 542, and quoted from that case in Little v. Bowers, 134 U. S. 547, at page 554, as follows: 'Where a party pays an illegal demand with full knowledge of all the facts which relate to such demand. without an immediate and urgent necessity therefor, or unless to release his person or property from detention or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back.' "

The above cases are conclusive against the plaintiff's right of action in the case at issue.

See also:

Berneys v. U. S. 208 U. S. 614;
Merck v. Treat, 202 Fed. 133;
Newhall v. Jordan, 160 Fed. 661;
Gulbenkian v. U. S., 175 Fed. 860;
Cooley on Taxation, Vol. II, 3rd Ed., p. 1495;
Dunnell Mfg. Co. v. Newell, 2 Atl. 769.

2. What constitutes duress or compulsion:

There is duress or compulsion when the taxpayer has been placed under arrest or when there has been a distraint or seizure of his chattels for the purpose of compelling him to pay the tax; or when the officer, being armed with a lawful process and having authority to enforce his demand, has made a distinct threat to seize and sell property; or a searching for property on which to levy. It is also, possibly enough to constitute duress or compulsion if the officer simply demands payment of the tax under cover of a warrant or other process, which gives him legal power to enforce his demand by compulsory proceedings against the person or property and which makes it his duty to do so, although he makes no threat and takes no steps to distrain or levy. And in this case the process has the force of an execution and the taxpayer is justified in believing that if he refuses to pay the tax a levy on his property will follow as the only alternative and, therefore, he is not obliged to wait for a distraint or a threat of distraint. But there is no duress or legal compulsion where the payment is made before the tax is due or delinquent. (Merrill v. Austin, 53 Cal. 379; Santa Rosa Bank v. Chalfant, 52 Cal. 170; Van Hise v. Rensselaer Co., 21 Misc. (N. Y.) 572, 48 N. Y. Suppl. 874; Atchison, etc., R. R. Co. v. Atchison Co., 47 Kans. 722, 28 Pac. 99), or where the officer has no warrant or has a warrant which is entirely void so that he could not carry out his threat. (Bakersfield etc., Oil Co. v. Kern Co., 144

Cal. 148, 77 Pac. 892; Morris v. New Haven, 78 Conn. 673, 63 Atl. 123; Godkin v. Doyle Tp., 143 Mich. 236, 106 N. W. 882; Carton v. Uinta Co., 10 Wyo. 416, 69 Pac. 1013; Sonoma Co. Tax Case, 13 Fed. 789; Little v. Bowers, 134 U. S. 547; R. R. Co. v. Commissioners, 98 U. S. 542; U. S. v. New York and Cuba Mail Steamship Co., 200 U. S. 488; Chesebrough v. U. S., 192 U. S. 253.)

No warrant of distraint or other process had been issued against the plaintiff at the time of the payment of the tax and no statement was made by the officer to whom payment was made, or by any other Government officer, which would lead the taxpayer to believe that such a warrant had been issued. Furthermore, the taxes were not assessed until some days after payment, and no distraint warrant could have been issued under the law until after assessment had been made, and until the expiration of ten days after notice and demand for payment thereof. Sections 3184, 3185, 3187, and 3188, Revised Statutes. The taxes for the month of December, 1919, were not due or delinquent at the time they were paid. Section 903 of the Revenue Act of 1918 provides that every person liable to tax under section 900 of the act shall make monthly returns and pay the taxes imposed by such section to the collector at such time and in such manner as the commissioner, with the approval of the secretary, may by regulations prescribe, and that the tax shall, without assessment by the commis-

sioner, or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. By article 37 of Regulations 47, the commissioner, with the approval of the secretary, has prescribed that such returns shall be made and the tax paid on or before the last day of each month, covering all transactions of the preceding month. Under the law and regulations, therefore, the December tax was not due until January 31, 1920 (one day after it was paid) and would not have been delinquent until February 1, 1920. The payment of the December tax was, therefore, voluntary and without duress or compulsion, both because no distraint warrant or other process had been, or could have been, issued against the taxpayer at the time of payment, and because the taxes were not due or delinquent at that time.

3. What constitutes a sufficient protest:

There is no protest unless the taxpayer at the time of payment protests to the officer seeking to enforce payment that the alleged tax is illegally demanded or that he intends to bring suit for the recovery thereof:

Erskine v. Van Arsdale, 15 Wall. 75;
Philadelphia v. Collector, 5 Wall. 720, l.c. 732;
Chesebrough v. U. S., 192 U. S. 253;
Beer v. Moffatt, 192 Fed. 984;
Herold v. Kahn, 159 Fed. 608;
Realty Co. v. Maxwell, 206 Fed. 333;
Marck v. Treat, 202 Fed. 133;
Johnson & Johnson v. Herold, 161 Fed. 593.

Conclusion.

The defendant respectfully submits that judgment of the lower court should be sustained for the following reasons:

1. Because the plaintiff manufactured or produced, and sold complete automobile trucks;

2. Because the taxes were paid voluntarily and without duress or protest.

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